U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 October 2006

Case No.: 2005-BLA-05143`

In the Matter of

B. W.
Claimant

v.

PHILIPPI DEVELOPMENT, INC.
Employer

And

WEST VIRGINIA CWP FUND
Carrier

And

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances: JACK R. HENEKS, Jr., Esq.
For Claimant

WILLIAM S. MATTINGLY, Esq.
For Employer

Before: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

The hearing was held before me in Morgantown, West Virginia on May 9, 2006, at which time the parties had full opportunity to present evidence and argument. The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

I. ISSUES

The following issues are presented for adjudication.[1]

(1) Whether the Employer is properly designated as the Responsible Operator, as defined in § 725.495;
(2) whether the Claimant has pneumoconiosis;
(3) whether his pneumoconiosis, if any, arose from coal mine employment;
(4) whether the Claimant is totally disabled;
(5) whether the Claimant's total disability, if any, is due to pneumoconiosis; and
(6) whether the Claimant has established a change in a condition of entitlement pursuant to § 725.309(d).

II. PROCEDURAL BACKGROUND

The Claimant filed this claim for benefits in August 2002 (DX 3-6).[2] On July 14, 2004, the District Director issued a proposed Decision and Order denying benefits (DX 27). The District Director determined that the Claimant had established that he had pneumoconiosis, and that his condition arose from his coal mine employment; however, the District Director also determined that the Claimant had not established that he was disabled, as defined in the applicable regulations. On August 12, 2004, the Claimant submitted a response in which he indicated he disagreed with the District Director's decision and submitted a medical report from Dr. Gordon Gress dated November 2002, in which, according to the Claimant, Dr. Gress opined that the Claimant was totally disabled. The District Director attached Dr. Gress' medical report to the record but did not consider it, as it was received after the District Director's deadline for submission of additional evidence. Consequently, on August 18, 2004, the District Director issued a revision of the proposed Decision and Order and again denied benefits, for the same reasons stated earlier (DX 31). The Claimant requested a formal hearing on September 1, 2004 (DX 34). On October 5, 2004, this case was referred to the Office of Administrative Law Judges for a formal hearing (DX 36). Subsequently, on April 19, 2006, the matter was assigned to me.

Records maintained by the Social Security Administration on behalf of the Claimant establish that he was employed between 1972 and 1992 by the Consolidation Coal Company.[3] In 1995 and 1996, he was employed by "P.T. Mine Services, Inc." (PTMI), of Fairmont, West

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[1] The parties stipulated that the Claimant has 30 years of coal mine employment (T. at 23-24). I find that the record supports this stipulation.

[2] The following abbreviations are used in this Opinion: "DX" refers to Director's Exhibits; "CX" refers to Claimant's Exhibits; "EX" refers to Employer's Exhibit's; "T" refers to the transcript of the May 9, 2006 hearing.

[3] The Claimant's pre-1972 coal mine employment is set out in the Social Security Administration records but is not relevant to this discussion.

Virginia, earning approximately $15,600.00 in 1995 and $18,000.00 in 1996 from this employment. In 1998 and 1999, he was employed by "GMS Mine Repair Maintenance", but his total earnings from that employer were only about $900.00. In 1999, he was employed by "Maple Creek Mining Inc.," earning approximately $,4300.00. He also was employed by the U.S. Department of Agriculture for a short time in 1999. In 2001 the Claimant was employed by "Precision Staffing Services Inc.," and earned $1,840.00.

During the administrative processing of this claim, the District Director initially determined that PTMI was not covered by insurance, nor authorized to self-insure, on the date of the Claimant's last employment with the company in 1996 (DX 16). The District Director identified Consolidation Coal, Inc., Anker Energy (the parent corporation of Philippi Development), and Philippi Development as potentially liable operators, and sent all of them notices of the Claimant's claim, as required by § 725.407. Subsequently, the District Director determined that Consolidation Coal and Anker Energy were not the responsible operators, and on June 24, 2004 and July 13, 2004, respectively, relieved them of liability (DX 16).[4] Philippi controverted designation as the responsible operator, on the basis that the Claimant was an employee of PTMI and not of Philippi (DX 20 and 23). Nevertheless, in the proposed Decision and Order, the District Director identified Philippi as the responsible operator.[5] In the summary of evidence accompanying the proposed Decision and Order, the District Director determined that the Claimant was an employee of Philippi. This document stated that there was a contractual relationship between Philippi Development and PTMI during the period of the Claimant's employment with PTMI,[6] and cited § 725.493 for the principle that absence of payment of wages will not negate an employment relationship. In addition, the District Director determined Philippi to be the responsible operator because all of the Claimant's subsequent employment (with four different employers) was for periods of less than one year (DX 27).

Philippi, the Employer, has continued to controvert its designation as responsible operator.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Background

This is a subsequent claim for benefits. In December 1996, the Claimant filed his first claim for benefits, which was administratively denied in April 1997. In adjudicating the prior claim, the District Director determined that the Claimant was unable to establish any of the elements of entitlement for benefits under the Act. The Claimant did not appeal the denial of this claim (DX 1).

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[4] The reasoning the District Director used in making these determinations is not included in the record.

[5] The proposed Decision and Order also dismissed Consolidation Coal and Anker Development as parties to the Claimant's claim.

[6] The document stated that Anker Energy presented a copy of the contract to the District Director's office; however, the record does not contain a copy of any such contract.

The Claimant was born in 1942. He is married and has no dependents other than his wife. As noted above, the Claimant's Social Security records indicate that he worked for PTMI in 1995 and 1996.

B. Claimant's Testimony

The Claimant testified under oath at the hearing. He stated that he worked for PTMI for about a year and a half, and was hired by "PT Mine Services" to work in the Philippi mines, doing a lot of extra work in the mines, including work at the face areas. The Claimant testified that he was paid at the Philippi mine site but his paycheck was from PTMI. The Claimant also testified that there was no sign or any other indication at the mine site that he worked for PTMI (T. at 28-30).

In response to questioning from the Employer's counsel, the Claimant testified that after he left PTMI he also worked for Garrett Mining and Repair, but not for a full year, and for Maple Creek Mining for a short time period (T. at 31). The Claimant testified that his last employment was for Precision Staffing at a Consolidation Coal Company mine, where he did construction underground (T. at 32).

The Claimant also testified that he began having breathing problems when he returned to the mines about a year and a half after a 1992 layoff. Eventually he was unable to hold a job because of his breathing problems, and that was why he left Maple Creek Mining (T. at 32-33). In the 1990s, the Claimant testified, he had bronchitis problems and received treatment (T. at 34). While working at PTMI, he began to have episodes of breathing problems, and he missed some work because of that. During that time period, the Claimant testified, he was provided a breathing filter apparatus for use underground, but he found it difficult to use (T. at 35-37). He quit his last employment because he came down with bronchitis and pneumonia again, and decided he needed to do something else (T. at 37). The Claimant testified that medical treatment would ease his bronchitis, but he would still have shortness of breath (T. at 38).

Since he stopped working, in 2001, the Claimant testified, his breathing has gotten a little bit worse (T. at 41). He is not able to do much, but is able to do a few household chores and can walk a bit. He has used an inhaler, as needed, for several years. He is only able to do yard work, such as lawn trimming, for about ten minutes before getting short of breath (T. at 43). The Claimant also testified that he was diagnosed with a heart condition, Wolfe Parkinson White Syndrome, about eight or ten years ago, and he gets palpitations sometimes. He had surgery for an aortic aneurysm several years ago, after he quit working, and now has an aortic valve. He currently has a second aneurysm, which is being monitored (T. at 44-47).

The Claimant testified that he is five feet, nine inches tall, and has gained a significant amount of weight over the last ten years, going from 180 pounds to 255. However, he stated that he began having trouble with his breathing before he gained most of his weight (T. at 48-50).

At PTMI, the Claimant testified, he was a fire boss for about half of each shift, and the other half he was a general laborer. PTMI supplied fire bosses and laborers and machine operators, but not supervisors. As a fire boss, he did not have a supervisor but reported to the

state of West Virginia. There was a supervisor, a mine foreman, paid by Philippi, who would make comments to him. According to the Claimant's testimony, Philippi Development was in control and gave the orders on a daily basis as to where the work was to be done (T. at 55-57).

Except for an occasional cigar, at a celebration, the Claimant testified, he does not smoke, and has never been a cigarette smoker. He last smoked a cigar 10 or 15 years ago (T. at 58). The Claimant testified that he was recently advised that he needed to have oxygen at night because of his breathing trouble, and oxygen has helped him get better sleep (T. at 61-62). He sees his current physician often, about once a month, always for something respiratory (T. at 63).

In response to my questions, the Claimant testified that when he was not working as a fire boss, he did general inside work at the face of the coal. Sometimes he would have a supervisor, but sometimes not. Sometimes people who worked for Philippi would be there to supervise, and sometimes PTMI, but there was no set rule. There was one person who was over everything, and that person worked for Philippi (T. at 67-68).

C. Responsible Operator

The Act states that the Secretary of Labor shall by regulation establish standards for apportioning liability for benefits among more than one operator, when such apportionment is appropriate. 30 U.S.C. § 932(h). The term "operator" is defined in § 725.491(a) as "(1) Any owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine; or (2) Any other person who: … (iii) paid wages or a salary, or provided other benefits, to an individual in exchange for work as a miner…".

The Employer does not contest that it is an operator under the Act and the governing regulations. Rather, its position is that it was never the Claimant's employer, because the Claimant was employed by PTMI. The Employer also states that the Director's conclusion, not to name PTMI as the responsible operator because PTMI was no longer in business, is not supported by evidence of record. Lastly, the Employer contends that perhaps Consolidation Coal Company should be named as the responsible operator, because at the hearing the Claimant stated that his final employment, for Precision Staffing, was at a Consolidation Coal Company site. (See Employer's post-hearing Brief).

In response, the Director, Office of Worker Compensation Programs, U.S. Department of Labor, stated that PTMI could not be designated as the responsible operator because it did not have adequate financial resources, as is required under the regulation. Additionally, the Director stated that the evidence adduced in the processing of the Claimant's claim and at the hearing, established that the Claimant, while an employee of PTMI, worked under the direction of the Employer's personnel, and for the benefit of the Employer. Consequently, the Employer should be deemed to have an employment relationship with the Claimant, and can be held to be the

responsible operator. The Director did not address the issue of whether Consolidation Coal Company could be considered the responsible operator. (See Director's post-hearing brief.)[7]

A discussion of whether the Employer should be considered the responsible operator must begin with an analysis of the applicable regulation. Because § 725.495 states that the operator responsible for the payment of benefits shall be the potentially liable operator that most recently employed the miner, the designation of "responsible operator" is thereby limited to those entities which may be designated as "potentially liable operators." Section 725.494 discusses "potentially liable operators." A "potentially liable operator" must have been an operator for any period after June 1973 (§ 725.494(b)); must have employed the miner for a cumulative period of not less than one year (§ 725.494(c)); must have employed the miner for at least one day after December 1969 (§ 725.494(d)); and must be capable of assuming financial liability for the payment of benefits (§ 725.494(e)). The latter condition is established if the operator had insurance for the time period covering the miner's employment; if the operator qualified as a self-insurer and still has sufficient assets to self-insure or secure the payment of benefits; or if the operator possesses sufficient assets to secure the payment of benefits. Id.

According to Social Security Administration records, PTMI employed the Claimant in 1995 and 1996 (DX 8).[8] In his Claim, the Claimant asserted he was employed by PTMI from April 1995 to December 1996 (DX 5). The record reflects that PTMI was not insured as of the last date of the Claimant's employment, in 1996 (DX 16). The record also reflects that, in October 2004, the District Director determined that PTMI was no longer in business (DX 16). [9]

Consequently, although PTMI was indeed the Claimant's employer in 1995 and 1996, it cannot be named as a "potentially liable operator" under the governing regulations. Therefore, it was necessary to examine the Employer, as well as other potentially liable operators. As § 725.493(a)(1) states: "In determining the identity of a responsible operator under this part, the terms 'employ' and 'employment' shall be construed as broadly as possible, and shall include any relationship under which an operator retains the right to direct, control, or supervise the work performed by a miner, or any other relationship under which an operator derives a benefit from the work performed by a miner…." Moreover, § 725.493(a)(2) states, in pertinent part: "The Department intends that where the operator who paid a miner's wages or salary meets the criteria for a potentially liable operator … that operator shall be primarily liable for the payment of any benefits due the miner as a result of such employment. The absence of such payment, however, will not negate the existence of an employment relationship. Thus, the Department also intends that where the person who paid a miner's wage may not be considered a potentially liable operator, any other operator who retained the right to direct, control or supervise the work

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[7] The Claimant did not take a position as to whether the Employer is correctly designated as the responsible operator. (See Claimant's post-hearing filing).

[8] The Claimant earned $15,600 from PTMI in 1995 and $18,000 in 1996. These amounts establish that PTMI employed the Claimant for at least one year, as calculated in § 725.101(a)(32).

[9] Although the District Director could not locate PTMI's president, the failure to locate him is immaterial at this point, as a corporate officer is excluded from the definition of "operator" under § 725.491(c).

performed by the miner, or who benefitted from such work, may be considered a potentially liable operator."

Based on the foregoing, it is clear that the regulation permits an operator who did not directly employ a miner to be considered as a potentially responsible operator. Although the regulation contemplates that the operator who directly paid a miner's salary should be looked to first, the regulation also specifically provides that any other operator who either retained the right to supervise the miner's work, or who benefitted from such work, may also be held responsible. Under the facts of this case, it is clear that the Employer met both requirements. As the Claimant testified, the supervisors at the mine site, which the Employer operated, were generally the Employer's personnel. On the occasions that he was supervised, the supervisor was at times a member of the Employer's work force (T. at 55-57, 67-68). Further, I find that in the Claimant's work as a fire boss, where he did not have a supervisor, the Employer benefitted from his work, because the Claimant's duties helped to ensure the safety of the mine, for the benefit of the Employer and the other personnel at the site, including those employed by the Employer. Based on the regulation, therefore, and the facts set forth in the record, I find that the Employer employed the Claimant, as defined in § 725.493, and so was properly designated as a potentially liable operator.

Next, § 725.495 states that the operator responsible for the payment of benefits shall be the potentially liable operator that most recently employed the miner. According to the Social Security Administration records, the Claimant was employed by GMS Mine Repair Maintenance in 1998 and 1999, earning a total of approximately $900.00 from that employer; was employed by Maple Creek Mining, Inc., in 1999, earning about $4,300.00; by the U.S. Department of Agriculture in 1999, earning about $,1700.00; and by Precision Staffing Services, Inc., in 2001, earning about $1,850.00 (DX 8). According to the Claimant's Claim, all of this employment, except for the U.S. Department of Agriculture employment, was coal mine employment. The Claimant's Claim reflects that his employment for Precision Staffing was at "Cumberland Mine" in Morgantown, West Virginia, was "Coal Mining & Extraction" at an underground mine, and his work consisted of "General Labor & Machine Operator" (DX 5).

Considering that a potentially liable operator must employ the miner for at least a year, (§ 725.494(c)), GMS Mine Repair Maintenance and Maple Creek Mining are properly excluded, as the Claimant was employed by these entities for only short periods.[10] Taking into consideration only the Claimant's employment with Precision Staffing, that company should also be excluded, as the Claimant likewise worked for that company for only a short time.

However, the Employer asserts that the Claimant's employment with Precision Staffing should be attributed to Consolidation Coal Company, because the Claimant testified at the hearing that his work for Precision Staffing was at a Consolidation site (T. at 32). As the Claimant's Social Security records reflect, he was employed by Consolidation Coal Company between 1972 and 1992. The regulation permits time periods to be aggregated, for designation

[10] The Claimant's claim indicates that he was employed by each of these companies for two months, by GMS as a general laborer and by Maple Creek as a Section foreman. His statement is not inconsistent with the Social Security Administration records of the amounts paid to him.

as responsible operator. A responsible operator must employ a Claimant for a year or more, but need not employ the Claimant for the final year of his coal mine employment. See Snedeker v. Island Creek Coal Co., 5 B.L.R. 1-91 (1982).

The record reflects, however, that Consolidation Coal Company was notified that it was a potentially liable operator, that it responded controverting responsibility, and that it was ultimately dismissed from liability by the District Director (DX 16; DX 27). An administrative law judge may consider a new issue only if that issue was not reasonably ascertainable at the time the matter was before the District Director. § 725.463(b). Although the testimony of the Claimant about his employment with Precision Staffing was not obtained until the hearing, the record contains sufficient information to have enabled the Employer to ascertain whether, in fact, that employment should be combined with the Claimant's other employment with Consolidation Coal Company. As noted above, the Claimant's claim sets out clearly the name and location of the mine at which he worked, as well as the nature of his duties. It was clear, from the record, that the Claimant was engaged in coal mine employment. Moreover, from the information set forth in the Claimant's claim, the "Cumberland Mine" operator in Morgantown would be readily ascertainable.

Based on the foregoing, I find that the issue of the relationship, if any, between Precision Staffing and Consolidation Coal Company was reasonably ascertainable by the Employer at the time the matter was before the District Director. Consequently, I am unable to consider the issue the Employer raises, of Consolidation Coal Company's potential liability.

I also find that, based on the evidence contained in the record, the Employer's designation as the responsible operator, in accordance with § 725.495, was appropriate, and is supported by the evidence of record.

D. Relevant Medical Evidence

The Claimant presented a medical report from Dr. Gordon Gress, dated November 2002, as well as the transcript of Dr. Gress's April 2006 deposition (DX 30, CX 1).[11] The Claimant also presented a medical report from Dr. Murray Sachs, dated March 2000, along with Dr. Sachs's curriculum vitae (CX 2). At the hearing, the Claimant's counsel stated that Dr. Sachs's report was intended as a supplement to Dr. Gress's report, because Dr. Gress referred to Dr. Sachs's report (T. at 7-9).[12] The Claimant also proffered results of two X-ray interpretations and other medical tests compiled in conjunction with the Claimant's prior claim (DX 1).

[11] The Employer also presented, and I admitted, another copy of Dr. Gress's April 2006 deposition (EX 5). For the sake of consistency, I will refer to this document as CX 1 throughout this Decision.

[12] Based in part on the fact that Claimant's counsel stated that Dr. Sachs's report was background to Dr. Gress's report, I denied the Claimant's request for post-hearing deposition of Dr. Sachs. In my ruling, I informed Claimant's counsel that he could renew his request for deposition based on the post-hearing documents he received (T. at 73). He has not done so.

At the hearing the Claimant presented a document from Oximetry Company, LLC, reflecting that the Claimant had undergone an overnight oxygen oximetry test on April 26, 2006 (CX 3). After the hearing, the Claimant proffered a statement from Dr. Kelly Nelson, the Claimant's treating physician, regarding the reasons the Claimant was prescribed oxygen (CX 4). At the hearing, I authorized the Claimant to submit this item, and also provided the Employer the opportunity to submit a response to Dr. Nelson's statement from the physicians the Employer had consulted (T. at 69-71).

The Employer presented medical reports and curriculum vitae of Dr. Joseph Renn and Dr. Gregory Fino (EX 1-4), as well as the transcript of Dr. Fino's May 8, 2006 deposition (EX 7). In addition, the Employer presented the deposition transcript of Dr. Prasad Devhabhaktuni, the physician who conducted the Claimant's pulmonary evaluation on behalf of the Department of Labor in conjunction with this claim (EX 6). The Employer also proffered the results of an X-ray interpretation compiled in conjunction with the Claimant's prior claim (DX 1). After the hearing, the Employer submitted supplemental medical reports from Dr. Renn and Dr. Fino (EX 8 and 9), reflecting these physicians' reviews of Dr. Sachs' medical report and Dr. Nelson's statement.[13]

These items will be discussed in greater detail below.

E. Entitlement

Because this claim was filed after January 19, 2001, the Claimant's entitlement to benefits is evaluated under the revised regulations set forth at 20 C.F. R. Part 718. The Act provides for benefits for miners who are totally disabled due to pneumoconiosis. § 718.204(a). In order to establish an entitlement to benefits under Part 718, the Claimant bears the burden to establish the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) the miner is totally disabled: and (4) the miner's total disability is caused by pneumoconiosis. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

Because this claim is a subsequent claim, it must be denied unless the Claimant can demonstrate that one or more applicable conditions of entitlement have changed since the denial of the prior claim. § 725.309(d). Lisa Lee Mines v. OWCP, 86 F.3d 1358 (4th Cir. 1996)(en banc); White v. New White Coal Co., 23 B.L.R. 1-1, 1-3 (2004).

As § 725.309(d) states, the following rules pertain to the adjudication of subsequent claims:

[13] At the hearing, the Employer stated that he wished to introduce an X-ray interpretation after the hearing by Dr. Fino of an X-ray taken on November 7, 2002, as rebuttal to the Claimant's interpretation of the same X-ray, which was administered as part of the Claimant's pulmonary evaluation in accordance with § 725.406. The Claimant had no objection, and I admitted the Exhibit. The Exhibit is appended to Dr. Fino's deposition. I considered both documents as Employer's Exhibit 7 (EX 7).

(1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim;

(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based….[I]f the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously;

(3) If the applicable conditions of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement…

1. Elements of Entitlement:

Pneumoconiosis Defined:

Section 718.201(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." This definition includes both medical or "clinical" pneumoconiosis, and statutory, or "legal" pneumoconiosis, which themselves are defined in that subparagraph at (1) and (2). "Clinical" pneumoconiosis consists of diseases recognized by the medical community as pneumoconioses, characterized by permanent deposition of substantial amounts of particulates in the lungs, and the fibrotic reaction of the lung tissue, caused by dust exposure in coal mine employment. "Legal" pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. Further, § 718.201(b) states: "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

a. Whether the Claimant has Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at §§ 718.202(a)(1) through (a)(4):

(1) X-ray evidence: § 718.202(a)(1).
(2) Biopsy or autopsy evidence: § 718.202(a)(2).
(3) Regulatory presumptions: § 718.202(a)(3).[14]

[14] These are as follows: (a) an irrebutable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis (§ 718.304); (b) where the claim was filed before January 1, 1982, a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment (§ 718.305); or (c) a rebuttable presumption of entitlement applicable to cases where

(4) Physician opinion based upon objective medical evidence: § 718.202(a)(4).

X-ray Evidence

Section 718.202(a)(1) states that a chest X-ray conducted and classified in accordance with § 718.102[15] may form the basis for a finding of the existence of pneumoconiosis.

The current record contains the following chest X-ray evidence:

Date of X-Ray	Date Read	Ex.No.	Physician	Radiological Credentials[16]	Interpretation
04/01/1997	04/01/1997	DX 1	Jaworski	B reader	ILO: 0/1
04/01/1997	04/18/1997	DX 1	McFarland	BCR, B reader	Negative
10/23/2002	10/28/2002	DX 30	Abrahams	BCR, B reader[17]	ILO: 0/1
11/07/2002	12/12/2002	DX 13	Devabhaktuni	None[18]	ILO: 1/1
09/15/2004	09/15/2004	EX 1	Renn	B reader	Neg. for pneumoconiosis

It is well established that the interpretation of an X-ray by a B-reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985); Martin v. Director, OWCP, 6 B.L.R. 1-535, 537 (1983). The Benefits Review Board has

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the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971 (§ 718.306).

[15] This section states that ILO Classifications 1, 2, 3 A, B, or C shall establish the existence of pneumoconiosis; Category 0, including subcategories 0/0 and 0/1, do not establish pneumoconiosis. Category 1/0 is ILO Classification 1.

[16] A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Board of Radiology. See generally: http://www.answers.com/topic/radiology#after_ad1. A "B reader" is a physician who has demonstrated proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the National Institute for Occupational Safety and Health (NIOSH). NIOSH is a part of the Centers for Disease Control and Prevention, in the U.S. Department of Health and Human Services. See 42 C.F.R. § 37.51 for a general description of the B reader program.

[17] Dr. Abrahams' qualifications are not contained in the record, and I obtained them from the internet. By order of February 7, 2006, the parties were notified that the administrative law judge may utilize the internet to obtain the qualifications of physicians and that parties who had not provided evidence of physician qualifications were deemed to have waived any objection to this practice.

[18] The Claimant cites a re-reading by Dr. Binns, a board-certified radiologist, on December 23, 2002, which the Claimant asserts validates Dr. Devabhaktuni's conclusions (DX 14). Dr. Binns' report does not specifically state whether pneumoconiosis is noted; the report does reflect "other significant abnormalities," specifically, aperture changes relating to cardiac valve prosthesis.

also held that the interpretation of an X-ray by a physician who is a Board-certified radiologist as well as a B-reader may be given more weight than that of a physician who is only a B-reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). Additionally, a finder of fact is not required to accord greater weight to the most recent X-ray evidence of record. Rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to consider. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

The X-ray evidence in the record consists of two X-rays considered in conjunction with the Claimant's prior claim, and three X-rays obtained in conjunction with the current claim. Of all of these X-rays, the only one that was interpreted as positive for coal workers' pneumoconiosis is the November 2002 X-ray interpreted by Dr. Devabhaktuni and Dr. Binns. Dr. Devabhaktuni has no specialized radiological credentials, being neither a Board-certified radiologist nor a B reader. Consequently, I give his interpretation little weight. It is unclear, from the record, how Dr. Binns interpreted the X-ray regarding pneumoconiosis.

All other X-rays in the record were interpreted as negative for pneumoconiosis. In this regard, I note that Dr. Abrahams is a Board-certified radiologist and a B reader. Under the governing regulation, his interpretation of the Claimant's October 23, 2002 X-ray, ILO; 0/1, does not constitute evidence of pneumoconiosis.[19] See § 718.102(b).

Biopsy or Autopsy Evidence

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). That method is not available here, as the current record contains no such evidence.

Regulatory Presumptions

A determination of the existence of pneumoconiosis may also be made using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy, or equivalent evidence of complicated pneumoconiosis, which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. §718.305(e). Section 718.306 applies only in cases of deceased miners who died before March 1, 1978. Since none of these presumptions applies in this case, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

Physician Opinion

The fourth way to establish the existence of pneumoconiosis under § 718.202 is set forth in subparagraph (a)(4): A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the

[19] Dr. Gress, who is neither a B reader nor a radiologist, interpreted the same X–ray as positive for pneumoconiosis (ILO: 1/0) (CX 1 at 31-32). See the discussion below of Dr. Gress's conclusions regarding the Claimant's condition.

miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion. As stated above, the definition of pneumoconiosis includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis, which are defined, respectively, in § 718.201(a)(1) and (2). Under this definition, legal pneumoconiosis includes any chronic restrictive or obstructive pulmonary disease causally linked to coal mine employment.

A medical opinion is well documented if it provides the clinical findings, observations, facts and other data the physician relied on to make a diagnosis. Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987). An opinion that is based on a physical examination, symptoms, and a patient's work and social histories may be found to be adequately documented. Hoffman v. B. & G Construction Co., 8 B.L.R. 1-65 (1985). A medical opinion is reasoned if the underlying documentation and data are adequate to support the findings of the physician. Fields, supra. A medical opinion that is unreasoned or undocumented may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989).

Dr. Gordon Gress (DX 30, CX 1)

Dr. Gordon Gress, who is Board-certified in internal medicine,[20] examined the Claimant in October 2002 and submitted a written report the following month (DX 30). Dr. Gress conducted a physical examination, took a medical and work history, and administered pulmonary function tests. He referred the Claimant locally for a chest X-ray, which also was read by Dr. Jonathan Abrahams, a Board-certified radiologist and B reader.

Dr. Gress concluded, based on the Claimant's work history and chest X-rays, that the Claimant had coal workers' pneumoconiosis. In particular, Dr. Gress stated that he observed opacities in profusion "1/0" in all six lung zones (DX 30) in the Claimant's X-ray taken locally; additionally, Dr. Gress related that Dr. Sachs had reported opacities in a chest X-ray in profusion "1/1", with all six lung zones involved. Dr. Gress also concluded that the Claimant had a mixed obstructive and restrictive pulmonary impairment, of moderate severity, based upon pulmonary function test results. Dr. Gress commented on the Claimant's other medical conditions, including obesity, hypertension, and hypothyroidism, as well as Wolfe-Parkinson-White Syndrome.

Dr. Gress also testified by deposition (CX 1). In his deposition, he stated that he personally evaluated the Claimant's chest X-ray, and interpreted the X-ray as evidencing mixed rounded and irregular opacities in all six lung zones, at profusion 1/0 (CX 1 at 30-31). Dr. Gress also testified that the Claimant's diminished lung function was due to coal workers' pneumoconiosis with coal dust, but there possibly also could be some asthmatic bronchitis (CX 1 at 38-39).

[20] Dr. Gress's qualifications are discussed in his deposition (CX 1).

Dr. Murray Sachs (CX 2)

Dr. Murray Sachs, who is Board-certified in internal medicine, examined the Claimant in March 2000 and submitted a written report (CX 2). Dr. Sachs's report reflects that he performed a physical examination of the Claimant, took a medical and work history, and administered a pulmonary function test and oxygen saturation test. Dr. Sachs's report also reflects that a chest x-ray was administered, but his report does not include a chest X-ray interpretation.[21] In his report, Dr. Sachs writes that the Claimant's chest X-ray showed "1/1P densities in all six lung zones." He also concludes that the Claimant had a "restrictive and mild small airway obstructive defect" (CX 2).

Dr. Sachs concluded that the Claimant had coal workers' pneumoconiosis and "superimposed asthmatic bronchitis," and stated that these were both the result of the Claimant's 23 years of coal mine dust exposure.

Dr. Joseph Renn (EX 1, 2, and 8)

Dr. Joseph Renn, who is Board-certified in internal medicine and pulmonary disease and is a B reader, conducted an examination of the Claimant in September 2004 and submitted a written report (EX 1, 2). After the hearing, the Employer submitted a supplemental report from Dr. Renn, which addressed Dr. Sachs's report and Nelson's written statement (EX 8).

Dr. Renn conducted a physical examination of the Claimant, took a medical and work history, and administered a chest X-ray and pulmonary function tests. Dr. Renn determined that the Claimant had mild to moderate restrictive lung impairment, and also some obstructive impairment, but concluded that these conditions were not due to coal mine dust exposure. Rather, according to Dr. Renn, the Claimant's condition was due to his obesity,[22] and also was a result of his various surgical procedures (e.g., aortic valve replacement), as well as probable asthma (EX 1). In his supplemental report, Dr. Renn stated that he disagreed with Dr. Sachs's conclusion that the Claimant had coal workers' pneumoconiosis with superimposed asthmatic bronchitis, but he did not explain why he disagreed with Dr. Sachs (EX 8).

Dr. Gregory Fino (EX 3, 4, 7,[23] and 9)

Dr. Gregory Fino, who is Board-certified in internal medicine and pulmonary disease and is a B reader, examined records relating to the Claimant and, in April 2006, submitted a written

[21] The Claimant did not proffer this X-ray in his affirmative case. At the hearing, the Claimant's counsel stated that Dr. Sachs's report was intended as background, to supplement Dr. Gress's report (T. at 8-9).

[22] Dr. Renn recorded the Claimant's height as 67 ½ inches and his weight as 260 pounds.

[23] I admitted into evidence Dr. Fino's interpretation of the Claimant's November 7, 2002 X-ray, at the hearing, and permitted the Employer to submit Dr. Fino's written report after the conclusion of the hearing (T. at 20-21). Dr. Fino's written interpretation of the X-ray is appended to the transcript of his deposition, which is EX 7. Employer's Exhibit 8 is Dr. Renn's supplemental report (See above).

report (EX 3, 4). Dr. Fino also testified by deposition (EX 7). After the hearing, the Employer submitted a supplemental report from Dr. Fino, which addressed Dr. Nelson's note (EX 9).

Based on the records he examined, Dr. Fino concluded that the Claimant did not have coal workers' pneumoconiosis or any dust-related pulmonary condition. Rather, according to Dr. Fino, any pulmonary impairment that the Claimant had was due to obesity (Dr. Fino noted that the Claimant's reported height was 5 feet, 8 inches tall and his reported weight was 265 pounds). At his deposition, Dr. Fino also discussed his interpretation of the Claimant's November 2002 X-ray, which Dr. Devabhaktuni had administered and had read as positive for coal workers' pneumoconiosis, and which had Dr. Fino concluded was negative for pneumoconiosis (EX 7 at 10-11). Dr. Fino's supplemental report stated that he had reviewed Dr. Sachs' report but he did not comment on it, except to state that he did not change his previous conclusion (EX 9).

Dr. Prasad Devabhaktuni (DX 13, EX 6)

In November 2002, Dr. Devabhaktuni performed the pulmonary evaluation provided for the Claimant by the Department of Labor in conjunction with his filing of this Claim (DX 13). See § 725.406. His professional credentials include Board certifications in internal medicine, pulmonary medicine, critical care, and sleep medicine (EX 6).[24] In his written report Dr. Devabhaktuni listed the following diagnoses: hypertension; obstructive pulmonary disease with possible asthma; and coal workers' pneumoconiosis. Regarding the etiology of the pulmonary conditions, Dr. Devabhaktuni wrote that the obstructive pulmonary disease could be due to asthma and that the coal workers' pneumoconiosis was due to coal dust exposure (DX 13). At his deposition Dr. Devabhaktuni discussed his conclusion that the Claimant had coal workers' pneumoconiosis. He testified that he read the Claimant's X-ray as showing opacities in the four lower lung zones, but conceded that coal workers' pneumoconiosis would not normally spare the upper lung zones (EX 6 at 11).

Dr. Kelly Nelson (CX 3, 4)

As set forth above, the Claimant proffered a written statement from Dr. Kelly Nelson, his treating physician (CX 4). This statement explained that the Claimant had several diagnoses that supported the use of oxygen at night, and listed those as dyspnea, hypertension, and a past aortic valve replacement. Dr. Nelson noted that the Claimant also had an abnormal chest X-ray. Dr. Nelson did not mention the etiology of any of the conditions he had diagnosed.

Discussion

The record reflects that three physicians -- Dr. Gress, Dr. Sachs, and Dr. Devabhaktuni -- diagnosed the Claimant with coal workers' pneumoconiosis. As reflected in his report, Dr. Gress relies primarily on X-ray evidence in coming to his conclusion. Specifically, Dr. Gress relies on two X-rays: the X-ray Dr. Sachs cites in his report, and the X-ray that he himself interpreted.

[24] Dr. Devabhaktuni's credentials are discussed in his deposition testimony (EX 6).

According to Dr. Gress, both of these X-rays showed opacities in all six lung zones, at levels of 1/1 and 1/0 respectively (DX 30).

As noted above, however, there is no record of the X-ray that Dr. Sachs relied upon, other than the fact that Dr. Sachs mentioned it in his own report (CX 2).[25] The X-ray that Dr. Gress himself interpreted as positive for pneumoconiosis, taken in October 2002, was also interpreted by Dr. Abrahams, a Board-certified radiologist and B reader. Dr. Gress has neither of these qualifications. Dr Abrahams interpreted the X-ray as showing opacities in profusion 0/1, which is not a positive pneumoconiosis determination under § 718.102(b).

Based on the foregoing, it is clear that Dr. Gress based his determination on X-ray interpretations reported to him second-hand (Dr. Sachs's X-ray), or which have been refuted by a physician with superior qualifications (Dr. Gress's X-ray). Consequently, I conclude that Dr. Gress's medical report is not well reasoned, and I give it little weight.

Dr. Devabhaktuni also based his determination that the Claimant has pneumoconiosis largely on X-ray evidence. However, similar to Dr. Gress, Dr. Devabhaktuni's assessment was grounded on an X-ray interpretation which may not be accurate. Dr. Devabhaktuni interpreted the Claimant's November 2002 X-ray as positive for pneumoconiosis; however, Dr. Devabhaktuni is neither a B reader nor a Board-certified radiologist. Consequently, I find that Dr. Devabhaktuni's conclusion that the Claimant has coal workers' pneumoconiosis is not well reasoned, and I give it little weight. Even assuming arguendo that the X-ray upon which Dr. Devabhaktuni relies does show evidence of pneumoconiosis, I give Dr. Devabhaktuni's determination little weight, because he does not link his conclusion to any objective data other than the Claimant's coal mine employment. Specifically, Dr. Devabhaktuni does not cite any objective medical test that tends to support his determination that the Claimant has coal workers' pneumoconiosis.

Dr. Renn is Board-certified in internal medicine and pulmonary medicine. His credentials, therefore, are superior to those of the physicians previously discussed. Dr. Renn's evaluation takes into consideration the Claimant's complex medical history (including a cardiac condition and aortic valve replacement), as well as the Claimant's weight. Dr. Renn based his conclusion on physical examination, medical history, and objective medical tests. He noted that the Claimant had no medical test results suggesting coal workers' pneumoconiosis. He also discussed the Claimant's medical test results, and noted the reversibility with bronchodilation. I find Dr. Renn's conclusion, that these multiple factors created the Claimant's pulmonary impairments, to be well-reasoned.

[25] The Claimant has not proffered this X-ray for consideration under § 725.414(a)(2). This section also provides that any X-ray or other medical test relied upon in a medical report must be otherwise admissible. § 725.414(a)(2)(i). Although I have considered Dr. Sachs's report, because of the evidentiary limitations pertaining to X-ray interpretations, I give limited weight to his discussion of this X-ray. I note only that Dr. Sachs has relied on an X-ray that he considers to be positive for pneumoconiosis.

Dr. Fino's conclusion, that the Claimant's excess weight is the source of his pulmonary ailments, is not as well reasoned as Dr. Renn's or Dr. Devabhaktuni's, and I give it little weight. Although the conclusion that the Claimant's obesity played a role in his condition is supported by other physicians, notably Dr. Devabhaktuni and Dr. Renn, no other physician concludes that the Claimant's excessive weight is the only issue. Dr. Fino is also Board-certified in internal medicine and pulmonary medicine. He did not examine the Claimant, but merely reviewed records. Although Dr. Fino did review Dr. Renn's report, which discusses the Claimant's medical history, Dr. Fino did not mention or discuss the Claimant's cardiac condition or major surgery. Consequently, it is unclear whether Dr. Fino considered those factors in making his determinations.

Based on the foregoing, I find that the Claimant cannot establish, through physician opinion, that he has coal workers' pneumoconiosis. However, as the regulation reflects, any chronic lung disease arising out of coal mine employment is considered to be "legal" pneumoconiosis. Chronic obstructive lung disease or other chronic lung conditions, when causally related to coal mine employment, falls within this definition. See § 718.201(a)(2). Consequently, I must assess the physician opinions to determine whether the Claimant has established that he has "legal" pneumoconiosis.

As noted above, Dr. Devabhaktuni diagnosed the Claimant with chronic obstructive pulmonary disease; Dr. Sachs diagnosed the Claimant with asthmatic bronchitis; Dr. Renn noted that the Claimant probably had asthma; and Dr. Nelson provided several diagnoses. However, none of these physicians explicitly linked these conditions to dust exposure or coal mine employment. Dr. Devabhaktuni indicated, both in his written report and his deposition, that this condition might be due to asthma (DX 13). Dr. Sachs did not make any determination about the etiology of the Claimant's asthmatic bronchitis. Dr. Renn called the Claimant's asthma "intrinsic," thereby negating a link with coal mine employment. Dr. Nelson's statement provided information about the Claimant's conditions but did not give any information about the cause of these conditions. Consequently, because no physician has linked any chronic pulmonary condition to coal mine employment, I find that the Claimant is unable to establish, through physician statement, that he has "legal" pneumoconiosis, as regulatorily defined.

Taking all the medical evidence into consideration, I find that the Claimant is unable to establish, by any means set forth in § 718.202, that he has pneumoconiosis, as defined in the governing regulation. See Bailey v. Consolidation Coal Co., B.R.B. No. 05-0324 B.L.A. (Sep. 30, 2005); Consolidation Coal Co. v. Held, 314 F.3d 184 (4th Cir. 2002). This constitutes no change from the final denial of the Claimant's previous claim, in 1997.

b. Whether the Pneumoconiosis "Arose out of" Coal Mine Employment

Under the governing regulation, a miner who was employed for at least ten years in coal mine employment is entitled to a rebuttable presumption that pneumoconiosis arose out of coal mine employment. § 718.203(b). The parties have stipulated that Claimant has established a coal mine employment history of 30 years. Therefore, he is entitled to the rebuttable presumption. However, as set forth above, I have found that the Claimant is unable to establish that he has pneumoconiosis. Consequently, the Claimant is unable to employ the presumption to

establish this element of entitlement. This represents no change from the final denial of his previous claim, in 1997.

c. Whether the Claimant is Totally Disabled

The Claimant bears the burden to establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) states that a miner shall be considered totally disabled "if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner: (i) from performing his or her usual coal mine work; and (ii) from engaging in gainful employment…requiring the skills or abilities comparable to those of any employment in a mine or mine in which he or she previously engaged with some regularity over a substantial period of time." Nonpulmonary and nonrespiratory conditions which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. § 718.204(a). See also Beatty v. Danro Corp., 16 B.L.R. 1-11 (1991).

The regulation provides that, in the absence of contrary probative evidence, the following may be used to establish a miner's total disability: pulmonary function tests with values below a specified threshold; arterial blood gas tests with results below a specified threshold; a finding of pneumoconiosis with evidence of cor pulmonale with right-sided congestive heart failure. § 718.204(b)(2)(i)(ii) and (iii). Where the above do not demonstrate total disability, or appropriate medical tests are contraindicated, total disability may nevertheless be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in his usual coal mine employment. § 718.204(b)(2)(iv).

Pulmonary Function Tests

The record contains the following pulmonary function test results: (where two values are listed, the second reflects values measured after bronchodilation).

Date of Test	Physician	FEV_1	FVC	MVV	FEV_1/FVC ratio	Valid ?
03/22/2000	Sachs	1.94/1.73	2.53/2.37	55.7/unk	77%/73%	unk[26]
10/23/2002	Gress	1.65	2.16	invalid	76%	unk[27]
11/08/2002	Devabhaktuni	1.85/2.04	2.61/2.87	49/unk	71%/71%	Yes
09/15/2004	Renn	1.69/1.89	2.60/2.70	56/74	65%/70%	Yes

In order to demonstrate total respiratory disability on the basis of the pulmonary function tests, the studies must, after accounting for gender, age, and height, produce a qualifying value for the forced expiratory volume [FEV_1] test and at least one of the following: a qualifying value

[26] Flow volume loops were included for the best trial (of three) only. See § 718.103(b).
[27] Flow-volume loops were not included in the record. See § 718.103(b).

for the forced vital capacity [FVC] test; a qualifying value for the maximum voluntary volume [MVV] test; or a value of the FEV_1 divided by the FVC that is less than or equal to 55%. § 718.204(b)(2)(i). "Qualifying values" for the FEV_1, FVC, and the MVV tests are results measured at less than or equal to the values listed in the appropriate tables of Appendix B to Part 718.

The Claimant was born in late September 1942. Therefore, he was 57 years old at the time of his first test, in March 2000; 60 years old for the tests conducted in 2002; and 61 years old for the test conducted on September 15, 2004. His height is variously recorded as 67 and 68 inches. Presuming that the Claimant is 67.5 inches, the average of the recorded heights, the qualifying FEV_1 value is 1.89 at age 57, 1.84 at age 60, and 1.83 at age 61. Qualifying FVC values for that height are 2.40 at age 57, 2.35 at age 60, and 2.33 at age 61. Qualifying MVV values are 76 at age 57, 74 at age 60, and 73 at age 61.

From the foregoing, it appears that the Claimant obtained FEV_1 results at or near qualifying values in pre-bronchodilation testing. After bronchodilators are administered, however, the Claimant obtained a qualifying FEV_1 value only in one test, the one administered by Dr. Sachs.[28] The validity of that test is questionable, however, as the record contains only one flow-volume loop tracing, not the multiple tracings that are required under the regulation. Moreover, it appears that in the test that Dr. Sachs administered, the Claimant's FEV_1 values actually fell after bronchodilators were administered. This is an unusual result, and calls into question the validity of Dr. Sachs's testing procedures.

The Claimant also obtained a qualifying FEV_1 value in the test that Dr. Gress administered; however, I am unable to determine whether Dr. Gress's test is valid, because the record does not include flow-volume loops. Dr. Gress conceded, in his deposition testimony, that he was unable to get a valid MVV reading for the Claimant in this test. Also, Dr. Gress did not test the Claimant after administering a bronchodilator (See EX 5 at 33-38).[29]

Based on the foregoing, therefore, where there is no record of a valid test in which the Claimant has obtained a qualifying FEV_1 value, I find that the Claimant is unable to establish, by means of pulmonary function test results, that he is totally disabled.

Arterial Blood Gas Tests

A Claimant may also establish total disability based upon arterial blood gas tests. In order to establish total disability, the test must produce a qualifying value, as set out in Appendix C to Part 718. § 718.204(b)(2)(ii). Appendix C lists values for percentage of carbon dioxide [PCO_2] and percentage of oxygen [PO_2], based upon several gradations of altitudes above sea

[28] Higher values obtained after bronchodilators are administered indicate that an individual's pulmonary disability is at least partially reversible. See generally § 718.103.

[29] Failure to administer a bronchodilator does not invalidate a pulmonary function test per se. However, in the Claimant's case, where he demonstrated a significant response to bronchodilators in other tests, such a test would have been useful.

level. At a specified gradation (e.g., 2999 feet above sea level or below), and PCO_2 level, a qualifying value must be less than or equivalent to the PO_2 listed in the table.

There is no record of any arterial blood gas testing performed in conjunction with the Claimant's current claim. Consequently, the Claimant is unable to establish, by means of arterial blood gas test results, that he is totally disabled.[30]

Cor Pulmonale

A miner may demonstrate total disability with, in addition to pneumoconiosis, medical evidence of cor pulmonale with right-sided congestive heart failure. § 718.204(b)(2)(iii). As stated above, I did not find that the Claimant had established the existence of pneumoconiosis. Moreover, there is no evidence of cor pulmonale with right sided congestive heart failure. Accordingly, I find that the Claimant has not established total disability under this provision.

Physician Opinion

The final method of determining whether the Claimant is totally disabled is through the reasoned medical judgment of a physician that the Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable gainful employment. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. § 718.204(b)(2)(iv). A reasoned opinion is one that contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id. An unreasoned or undocumented opinion may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989).

In his written report, Dr. Devabhaktuni concluded that the Claimant had a moderate pulmonary impairment, based on his pulmonary function test results (DX 13). At his deposition, Dr. Devabhaktuni stated that he was unable to determine whether the Claimant was totally disabled, from a pulmonary perspective, but commented that the Claimant's obesity and his obstructive impairment could make it difficult for him to perform in a coal mine environment (DX 6 at 21-22).

Dr. Gress concluded, in his written report, that the Claimant was disabled from employment based upon four factors: coal workers' pneumoconiosis; anticoagulation medications; obesity; and hypertension. He stated that the Claimant was disabled from coal mine employment based upon his diagnosis of coal workers' pneumoconiosis (DX 30). In his

[30] The Claimant has been on Coumadin®, a blood thinning agent, since at least 2002. Dr. Devabhaktuni, who performed the pulmonary evaluation on behalf of the Department of Labor, indicated that the Claimant's condition was not a contra-indication to arterial blood gas testing, but nevertheless he did not conduct such a test (EX 6 at 13). The record reflects that the Claimant refused such testing on at least one occasion: specifically, when he was examined by Dr. Renn (EX 1).

deposition, Dr. Gress stated that the Claimant was partially disabled from employment based on his pulmonary impairments alone; however, his other impairments combined with his pulmonary condition to make him totally disabled from employment (CX 1 at 39-42).

Dr. Sachs did not specifically determine whether the Claimant was disabled; however, Dr. Sachs did conclude that the Claimant "should not return to the coal mine industry since further exposure [to coal mine dust] will exacerbate and very likely cause progression of his respiratory problems" (CX 2).

Dr. Renn determined that, based on his respiratory system alone, the Claimant was disabled from coal mine employment in his last position as a section boss, as a general inside laborer, or any similar job (EX 1).

In his written report, Dr. Fino concluded that the Claimant's inability to take a deep breath would cause him to be disabled. However, Dr. Fino did not specify the degree of the Claimant's disability, or relate this disability to any of the Claimant's coal mine employment positions (EX 3). In his deposition, Dr. Fino also commented that the Claimant's requirement to remain on anticoagulation medications made him disabled from employment in any position, due to the risk of physical injury (EX 8).

Based on the foregoing, I find that the medical opinions do not establish that the Claimant is disabled, based on his pulmonary impairment alone. Of the physicians who ventured opinions on this matter, only Dr. Renn concluded that the Claimant's respiratory condition should be considered disabling, when considering the Claimant's coal mine employment. Dr. Renn, however, did not explain what objective test results led him to his conclusion. Notably, Dr. Renn did not perform arterial blood gas testing on the Claimant, and the pulmonary function tests did not reveal qualifying values after bronchodilation was administered. Consequently, there is an insufficient basis for me to conclude whether Dr. Renn's conclusion is supported by evidence, or is well-reasoned.

Based on the foregoing, therefore, I find that the Claimant is unable to establish that he is totally disabled due to his pulmonary impairments. This represents no change from the final denial of his previous claim, in 1997.

d. Whether the Claimant's Disability is Due to Pneumoconiosis

Lastly, the Claimant must establish that he is totally disabled due to pneumoconiosis. This element is fulfilled if pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. § 718.204(c). Island Creek Coal Co. v. Compton, 211 F.3d 203 (4th Cir. 2000). The regulations provide that pneumoconiosis is a "substantially contributing cause" of the miner's disability if it (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. A Claimant must establish this element through a physician's documented and reasoned medical report. §718.204(c).

As set forth above, I have found that the Claimant is unable to establish that he is totally disabled, from a pulmonary standpoint. However, assuming arguendo that he has established that he is totally disabled, I also find that the Claimant is unable to establish that pneumoconiosis, or any coal mine dust related condition, is the cause of his disabling impairment. The consensus of the medical opinions, summarized above, is that the Claimant's pulmonary impairment is either caused by or significantly affected by his weight, as well as by other non-respiratory medical conditions.[31] This represents no change from the final denial of the Claimant's previous claim, in 1997.

F. Subsequent Claim

As set forth above, I find that the Claimant is unable to establish, by a preponderance of evidence, any of the elements of entitlement that previously had been adjudicated against him. Therefore, his Claim must be denied. § 725.309(d).

IV. CONCLUSION

Based upon applicable law and my review of all of the evidence, I find that the Claimant has not established his entitlement to benefits under the Act.

V. ATTORNEY'S FEE

The award of an attorney's fee is permitted only in cases in which a Claimant is represented by counsel and is found to be entitled to benefits under the Act. Because benefits were not awarded in this Claim, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the Claim.

[31] In reaching this finding, I note also that several physicians have concluded that the Claimant should be considered to be totally disabled, based on the fact that he is on anticoagulant therapy, and so cannot be in any occupation in which he risks physical injury. Under the regulation, a nonpulmonary condition that causes a disability independent of the Claimant's pulmonary condition shall not be considered in determining whether the Claimant is disabled due to pneumoconiosis. § 718.204(a). Consequently, I have not considered the fact that the Claimant's anticoagulant therapy may constitute an independent nonpulmonary condition that may cause him to be disabled from employment.

VI. ORDER

The Claimant's Claim for benefits under the Act is DENIED.

A

Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).